



# Oregon

Tina Kotek, Governor

Department of Environmental Quality  
Office of Compliance and Enforcement  
700 NE Multnomah Street, Suite 600  
Portland, OR 97232-4100  
(503) 229-5696  
FAX (503) 229-5100  
TTY 711

December 5, 2023

CERTIFIED MAIL: 7014 2120 0001 8302 9705

Oregon Department of Transportation, Region 1  
Attn: Denis Reich, Environmental Manager  
123 NW Flanders  
Portland OR 97209

Re: Notice of Civil Penalty Assessment and Order  
Case No. WQ-SW-NWR-2022-572

This letter is to inform you that the Oregon Department of Environmental Quality (DEQ) has issued the Oregon Department of Transportation (ODOT) a civil penalty of \$19,194 for causing pollution to Fanno Creek on May 31, 2022, as a result of a turbid water discharge that occurred at the OR 217 corridor improvement project. The discharge occurred when an ODOT contractor performing excavation at the project breached an area that had accumulated ponded stormwater. No erosion and sediment control best management practices (BMPs) were installed before the excavation began. DEQ is also citing ODOT for violating conditions of the National Pollutant Discharge Elimination System Stormwater General Permit No.1200-CA (the Permit) that require implementation of BMPs and visual monitoring.

DEQ issued this penalty because it is essential for permit registrants to implement erosion and sediment controls at all stages of construction activity. Compliance with other conditions of the permit, such as monitoring, allow permit registrants to gauge the effectiveness of their stormwater controls to ensure that pollutants are not allowed to discharge off-site where they can enter waters of the state.

DEQ appreciates that ODOT promptly took corrective action to minimize the discharge of turbid water and that it reported this event to DEQ and cooperated with DEQ's follow-up investigation. DEQ considered these efforts when determining the amount of civil penalty.

You may pay the civil penalty as follows:

Pay online with e-check (ACH) or Credit Card. Go to Your DEQ Online here:  
<https://ydo.oregon.gov>. Select Register Account or Login, then select Pay Invoices/Fees on your account dashboard. Enter the Invoice number and Account ID included on the attached payment slip. Note: US Bank charges a 2.3% convenience charge for credit card transactions. ACH payments have no additional charges.

Pay by check or money order: Make checks payable to "Department of Environmental Quality" and mail to the address on the enclosed payment slip. Please make sure to include the payment slip with your check or money order and note the case number on your check.

If you wish to appeal this matter, DEQ must receive a request for a hearing within 20 calendar days from your receipt of this letter. The hearing request must be in writing. Send your request to DEQ Office of Compliance and Enforcement:

Via mail – 700 NE Multnomah Street, Suite 600, Portland, Oregon 97232

Via email – [DEQappeals@deq.oregon.gov](mailto:DEQappeals@deq.oregon.gov)

Via fax – 503-229-6762

Once DEQ receives your request, we will arrange to meet with you to discuss this matter. If DEQ does not receive a timely written hearing request, the penalty will become due.

The attached Notice further details DEQ's reasons for issuing the penalty and provides further instructions for appealing the penalty. Please review and refer to it when discussing this case with DEQ.

DEQ may allow you to resolve part of your penalty through the completion of a Supplemental Environmental Project (SEP). SEPs are environmental improvement projects that you sponsor instead of paying a penalty. Further information is available by calling the number below or at <http://www.oregon.gov/deq/Regulations/Pages/SEP.aspx>.

DEQ's rules are available at <http://www.oregon.gov/deq/Regulations/Pages/Statutes.aspx> or by calling the number below.

If you have any questions, please contact Courtney Brown at 503-229-6839 or toll free in Oregon at 800-452-4011, extension 6839.

Sincerely,



Kieran O'Donnell, Manager  
Office of Compliance and Enforcement

Enclosures

Cc: Benjamin Benninghoff, DEQ  
Blair Edwards, DEQ  
Accounting, DEQ

1                                   BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

2   OF THE STATE OF OREGON

3 IN THE MATTER OF:  
4 OREGON DEPARTMENT OF  
TRANSPORTATION

5                                   Respondent.

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                                  )  
                                  )  
                                  )

NOTICE OF CIVIL PENALTY  
ASSESSMENT AND ORDER

CASE NO. WQ/SW-NWR-2022-572

6   I. AUTHORITY

7                   The Department of Environmental Quality (DEQ) issues this Notice of Civil Penalty Assessment  
8 and Order (Notice) pursuant to Oregon Revised Statutes (ORS) 468.100, ORS 468.126 through 468.140,  
9 ORS 468B, ORS Chapter 183 and Oregon Administrative Rules (OAR) Chapter 340, Divisions 011, 012,  
10 and 045.  
11

12   II. FINDINGS OF FACT

13               1.       On December 31, 2000, Respondent was assigned coverage under the National Pollutant  
14 Discharge Elimination System Stormwater General Permit No. 1200-CA (the Permit) for stormwater  
15 discharges from its construction activities. The Permit was in effect at all material times.  
16

17               2.       Since on or before May 31, 2022, and at all relevant times, Respondent engaged in a  
18 construction project located at I-5 South at Exit 292 to OR 217 to N. Kruse Way (the Project).  
19

20               3.       The Project's stormwater discharged to wetlands and to Fanno Creek.

NPDES 1200-CA condition violations

21               4.       Schedule A, condition 1 of the Permit requires that permit registrants develop and  
22 implement an Erosion and Sediment Control Plan (ESCP) that contains control measures and practices  
23 to prevent the discharge of significant amounts of sediment to surface waters.  
24

25               5.       On or about May 31, 2022, no erosion and sediment control best management practices  
26 (BMPs) had been installed before excavation began. Specifically, Respondent failed to install sediment  
27 fencing, straw wattles, check dams, straw bales, inlet protection, and bio bags at the Project.

1 Failing to Monitor

2 6. Schedule B, condition 2 of the Permit requires that permit registrants visually monitor  
3 stormwater discharges daily during storm water runoff and within 24 hours of any storm event greater  
4 than 0.5 inches of rain per 24-hour period.

5 7. There were storm events that produced more than 0.5 inches of rain in the vicinity of the  
6 Project on May 1, May 7, May 14, and May 29, 2022.

7 8. Respondent did not perform visual monitoring on or within 24 hours of these storm  
8 events listed in Section II, Paragraph 7 above.

9 Causing pollution to waters of the state

10 9. On May 31, 2022, sediment-laden water discharged from the Project to Fanno Creek  
11 creating a visible turbidity plume.

12 10. Turbidity tends to render such waters harmful, detrimental or injurious to legitimate  
13 beneficial uses including fish and other aquatic life and habitat thereof.

14 11. Fanno Creek is considered "waters of the state" according to ORS 468B.005(10).

15 III. CONCLUSIONS

16 1. Respondent has violated ORS 468B.025(2) and Schedule A, condition 1, of the Permit  
17 by failing to implement erosion and sediment control BMPs at the Project prior to excavation work  
18 beginning on May 31, 2022, as described in Section II, Paragraphs 4 and 5 above. This is a Class II  
19 violation according to OAR 340-012-0053(2). DEQ has not assessed a civil penalty for this violation.

20 2. Respondent has violated ORS 468B.025(2) and Schedule B, condition 2 of the Permit by  
21 failing to perform visual monitoring in accordance with the Permit. Specifically, Respondent failed to  
22 monitor within 24 hours of four separate storm events, as described in Section II, Paragraphs 6-8 above.  
23 These are class I violations according to OAR 340-012-0055(1)(o). DEQ hereby assesses a \$10,794 civil  
24 penalty for these violations.

25 3. On or about May 31, 2022, Respondent violated ORS 468B.025(1)(a) by causing pollution  
26 to waters of the state. Specifically, Respondent violated conditions of the Permit, as described in Section  
27 III, Paragraphs 1 and 2, above, and discharged sediment-laden water from its Project that changed the

1 turbidity of Fanno Creek, as described in Section II, paragraphs 9-11 above. Turbidity is considered  
2 “pollution” according to ORS 468B.005(5). This is a class I violation according to OAR 340-012-  
3 0055(2)(1)(a). DEQ hereby assesses a \$8,400 civil penalty for this violation.

#### 4 IV. ORDER TO PAY CIVIL PENALTY

5 Based upon the foregoing FINDINGS OF FACTS AND CONCLUSIONS, Respondent is  
6 hereby ORDERED TO: Pay a total civil penalty of \$19,194. The determinations of the civil penalties are  
7 attached as Exhibits No.1, and No.2 and are incorporated as part of this Notice.

8 If you do not file a request for hearing as set forth in Section V below, please pay the penalty as  
9 follows:

10 Pay online with e-check (ACH) or Credit Card. Go to Your DEQ Online here:  
11 <https://ydo.oregon.gov>. Select Register Account or Login, then select Pay Invoices/Fees on your account  
12 dashboard. Enter the Invoice number and Account ID included on the attached payment slip. Note: US  
13 Bank charges a 2.3% convenience charge for credit card transactions. ACH payments have no additional  
14 charges.

15 Pay by check or money order: Make checks payable to “Department of Environmental  
16 Quality” and mail to the address on the enclosed payment slip. Please make sure to include the payment  
17 slip with your check or money order.

#### 18 V. NOTICE OF RIGHT TO REQUEST A CONTESTED CASE HEARING

19 You have a right to a contested case hearing on this Notice, if you request one in writing. DEQ  
20 must receive your request for hearing **within 20 calendar days** from the date you receive this Notice. If  
21 you have any affirmative defenses or wish to dispute any allegations of fact in this Notice or attached  
22 exhibits, you must do so in your request for hearing, as factual matters not denied will be considered  
23 admitted, and failure to raise a defense will be a waiver of the defense. (See OAR 340-011-0530 for  
24 further information about requests for hearing.) You must send your request to: **DEQ, Office of**  
25 **Compliance and Enforcement, 700 NE Multnomah Street, Suite 600, Portland, Oregon 97232**, fax  
26 it to **503-229-6762** or email it to [DEQappeals@deq.oregon.gov](mailto:DEQappeals@deq.oregon.gov). An administrative law judge  
27 employed by the Office of Administrative Hearings will conduct the hearing, according to ORS

1 Chapter 183, OAR Chapter 340, Division 011 and OAR 137-003-0501 to 0700. You have a right to be  
2 represented by an attorney at the hearing, however you are not required to be. If you are an individual,  
3 you may represent yourself. If you are a corporation, partnership, limited liability company,  
4 unincorporated association, trust or government body, you must be represented by an attorney or a duly  
5 authorized representative, as set forth in OAR 137-003-0555.

6 Active duty Service members have a right to stay proceedings under the federal Service  
7 Members Civil Relief Act. For more information contact the Oregon State Bar at 1-800-  
8 452-8260, the Oregon Military Department at 503-584-3571, or the nearest United States Armed  
9 Forces Legal Assistance Office through <http://legalassistance.law.af.mil>. The Oregon Military  
10 Department does not have a toll free telephone number.

11 If you fail to file a timely request for hearing, the Notice will become a final order by default  
12 without further action by DEQ, as per OAR 340-011-0535(1). If you do request a hearing but later  
13 withdraw your request, fail to attend the hearing or notify DEQ that you will not be attending the  
14 hearing, DEQ will issue a final order by default pursuant to OAR 340-011-0535(3). DEQ designates  
15 the relevant portions of its files, including information submitted by you, as the record for purposes of  
16 proving a prima facie case.

17  
18  
19 12 / 5 / 2023  
20 Date

21   
22 Kieran O'Donnell, Manager  
23 Office of Compliance and Enforcement  
24  
25  
26  
27

EXHIBIT No.1

FINDINGS AND DETERMINATION OF RESPONDENT'S CIVIL PENALTY  
PURSUANT TO OREGON ADMINISTRATIVE RULE (OAR) 340-012-0045

VIOLATION No.2: Violating Schedule B, condition 2 of the Permit, in violation of ORS 468B.025(2), by failing to perform visual monitoring inspections.

CLASSIFICATION: This is a Class I violation pursuant to OAR 340-012-0055(1)(o).

MAGNITUDE: The magnitude of the violation is moderate pursuant to OAR 340-012-0130(1), as there is no selected magnitude specified in OAR 340-012-0135 applicable to this violation, and the information reasonably available to DEQ does not indicate a minor or major magnitude.

CIVIL PENALTY FORMULA: The formula for determining the amount of penalty of each violation is:  $BP + [(0.1 \times BP) \times (P + H + O + M + C)] + EB$

"BP" is the base penalty, which is \$4,000 for a Class I, moderate magnitude violation in the matrix listed in OAR 340-012-0140 (3)(b)(A)(ii) and applicable pursuant to OAR 340-012-0140 (3)(a)(E)(iii) because Respondent has coverage under an NPDES General Permit.

"P" is whether Respondent has any prior significant actions (PSAs), as defined in OAR 340-012-0030(19), in the same media as the violation at issue that occurred at a facility owned or operated by the same Respondent, and receives a value of 10 according to OAR 340-012-0145(2) because in the prior ten years Respondent has had prior significant actions consisting of nine or more Class I equivalent violations in Case Nos. WQ/M-ER-2016-144, WQ/401-NWR-2020-141, WQ/401-NWR-2021-504, WQ/SW-NWR-2022-595, and WQ/401-WR-2023-567.

"H" is Respondent's history of correcting prior significant actions and receives a value of 0 according to OAR 340-012-0145(3)(c) because there is insufficient information on which to base a finding under paragraphs (3)(a) or (b).

"O" is whether the violation was repeated or ongoing and receives a value of 2 according to OAR 340-012-0145(4)(b) because there was more than one but less than seven occurrences of the violation. Respondent failed to perform four instances of visual monitoring.

"M" is the mental state of Respondent and receives a value of 4 according to OAR 340-012-0145(5)(c) because Respondent's conduct was negligent. According to OAR 340-012-0030(15), negligent means the respondent failed to take reasonable care to avoid a foreseeable risk of conduct constituting or resulting in a violation. Respondent is permitted under the NPDES 1200-CA Permit which expressly requires Respondent to comply with the conditions set forth in the Permit, including performing visual monitoring inspections. By

failing to perform the visual monitoring required under the Permit, Respondent failed to take reasonable care to avoid the risk that it was in violation of the Permit.

"C" is Respondent's efforts to correct or mitigate the violation and receives a value of 0 according to OAR 340-012-0145(6)(f) because there is insufficient information to make a finding under paragraphs (6)(a) through (6)(e), or (6)(g).

"EB" is the approximate dollar value of the benefit gained and the costs avoided or delayed as a result of the Respondents' noncompliance. It is designed to "level the playing field" by taking away any economic advantage the entity gained and to deter potential violators from deciding it is cheaper to violate and pay the penalty than to pay the costs of compliance. In this case, "EB" receives a value of \$394. This is the amount of benefit Respondent obtained by avoiding the costs of performing 4 visual monitoring inspections at a cost of \$95/each, as required in the Permit. This "EB" was calculated pursuant to OAR 340-012-0150(1) using the U.S. Environmental Protection Agency's BEN computer model.

PENALTY CALCULATION:  $\text{Penalty} = \text{BP} + [(0.1 \times \text{BP}) \times (\text{P} + \text{H} + \text{O} + \text{M} + \text{C})] + \text{EB}$   
= \$4,000 + [(0.1 x \$4000) x (10 + 0 + 2 + 4 + 0)] + \$394  
= \$4,000 + (\$400 x 16) + \$394  
= \$4,000 + \$6,400 + \$394  
= \$10,794



EXHIBIT No. 2

FINDINGS AND DETERMINATION OF RESPONDENT'S CIVIL PENALTY  
PURSUANT TO OREGON ADMINISTRATIVE RULE (OAR) 340-012-0045

VIOLATION 3: Violating ORS 468B.025(1)(a) by discharging sediment-laden water from the Project which caused pollution to Fanno Creek, waters of the state, on May 31, 2022.

CLASSIFICATION: This is a Class I violation pursuant to OAR 340-012-0055(1)(a).

MAGNITUDE: The magnitude of the violation is moderate pursuant to OAR 340-012-0130(1), as there is no selected magnitude specified in OAR 340-012-0135 applicable to this violation, and the information reasonably available to DEQ does not indicate a minor or major magnitude.

CIVIL PENALTY FORMULA: The formula for determining the amount of penalty of each violation is:  $BP + [(0.1 \times BP) \times (P + H + O + M + C)] + EB$

"BP" is the base penalty, which is \$4,000 for a Class I, moderate magnitude violation in the matrix listed in OAR 340-012-0140 (3)(b)(A)(ii) and applicable pursuant to OAR 340-012-0140 (3)(a)(E)(iii) because Respondent has coverage under an NPDES General Permit.

"P" is whether Respondent has any prior significant actions (PSAs), as defined in OAR 340-012-0030(19), in the same media as the violation at issue that occurred at a facility owned or operated by the same Respondent, and receives a value of 10 according to OAR 340-012-0145(2) because in the prior ten years Respondent has had prior significant actions consisting of nine or more Class I equivalent violations in Case Nos. WQ/M-ER-2016-144, WQ/401-NWR-2020-141, WQ/401-NWR-2021-504, WQ/SW-NWR-2022-595, and WQ/401-WR-2023-567..

"H" is Respondent's history of correcting prior significant actions and receives a value of 0 according to OAR 340-012-0145(3)(c) because there is insufficient information on which to base a finding under paragraphs (3)(a) or (b).

"O" is whether the violation was repeated or ongoing and receives a value of 0 according to OAR 340-012-0145(4)(a) because there was only one occurrence of the violation. Each day of violation constitutes a separate occurrence. The violation occurred on at least one day, May 31, 2022.

"M" is the mental state of the Respondent and receives a value of 4 according to OAR 340-012-0145(5)(c), because Respondent's conduct was negligent. Respondent applied for coverage under the Permit and has a copy of the Permit, which expressly requires Respondent to comply with the conditions set forth in the Permit to minimize and control the discharge of sediment from the Project. By failing to adhere to the Permit conditions by failing to

implement BMPS prior to excavation work beginning, Respondent failed to take reasonable care to avoid a foreseeable risk that it would cause pollution to waters of the state.

"C" is Respondent's efforts to correct or mitigate the violation and receives a value of -3 according to OAR 340-012-0145(6)(c) because Respondent made reasonable efforts to correct the violation by June 8, 2022.

"EB" is the approximate dollar value of the benefit gained and the costs avoided or delayed as a result of the Respondent's noncompliance. It is designed to "level the playing field" by taking away any economic advantage the entity gained and to deter potential violators from deciding it is cheaper to violate and pay the penalty than to pay the costs of compliance. In this case, the amount of economic benefit Respondent obtained by delaying installing best management practices until June 8, 2022, was de minimis.

PENALTY CALCULATION:  $\text{Penalty} = \text{BP} + [(0.1 \times \text{BP}) \times (\text{P} + \text{H} + \text{O} + \text{M} + \text{C})] + \text{EB}$   
=  $\$4,000 + [(0.1 \times \$4,000) \times (10 + 0 + 0 + 4 + -3)] + \$0$   
=  $\$4,000 + (\$400 \times 11) + \$0$   
=  $\$4,000 + \$4,400 + \$0$   
=  $\$8,400$

Oregon Department of Environmental Quality  
700 NE Multnomah Street, Suite 600  
Portland, OR 97232-4100



State of Oregon  
Department of Environmental Quality

Phone: 503-229-5437  
Fax: 503-229-5850

**CIVIL PENALTY - ORS 468.135(2)**

DATE:	December 5, 2023
RESPONSE DATE :	February 13, 2024
TOTAL PENALTY:	\$19,194.00

Account Name:	NWP #14 - OR217: OR10 , OR99W SEC.		
Account Type:	Vendor/Organization/Company	Reference Number:	CPGFD2400026
SubSystem ID:	184537	FIMS Acct. ID:	10369

**Penalty Summary**

Penalty Amount	Interest	Adjustment	Amount Paid	Total Penalty
\$ 19,194.00	\$ 0.00	\$ 0.00	\$ 0.00	\$ 19,194.00

Payment of this penalty is subject to the exercise of your options or right to appeal as described in the enclosed enforcement documents.

To Pay Online with ACH or Credit Card Visit <https://ydo.oregon.gov> and select 'Register Account'



PLEASE RETURN THIS PORTION WITH YOUR PAYMENT



REFERENCE NO.	CPGFD2400026		
PAYCODE:	00401 7400 10040 74001 0500 000000 00		
FEE PROGRAM ID:	950	RESPONSE DATE:	February 13, 2024
FIMS ACCT. ID:	10369	TOTAL PENALTY DUE:	\$19194.00

AMOUNT ENCLOSED:

MAKE CHECK PAYABLE TO: Department of Environmental Quality

☐

Check this box if updated address information has been provided on the back of the form.

DEQ FINANCIAL SERVICES - LBX4244  
PO BOX 4244  
PORTLAND OR 97208-4244

00401 7400 10040 74001 0500 000000 0095000103692CPGFD240002600019194005



State of Oregon  
Department of  
Environmental  
Quality

## State of Oregon Department of Environmental Quality

CIVIL PENALTY - ORS 468.135(2)

700 NE Multnomah Street, Suite 600  
Portland, OR 97232-4100  
Phone: 503-229-5437  
Fax: 503-229-5850

### Penalty Detail

Transaction Date	Description	Amount
12/4/2023	2022-572 WQ-SW-NWR-2022-572	\$19,194.00

### SFMS Agencies Use:

Trans Code	Treasury Fund	SFMS	Index	PCA (5)	Agency Object	Project #	Phase
723	00401	7400	10040	74001	0500	00000	00

### Address Changes

Please visit <https://ydo.oregon.gov> to update  
your mailing address online or provide the  
following information:

Name \_\_\_\_\_  
Address \_\_\_\_\_  
City, State, Zip \_\_\_\_\_